

DRAFT

SCIENCE PROGRAM POLICY ON OPEN MEETINGS AND CONFLICT OF INTEREST FOR CALIFORNIA BAY-DELTA AUTHORITY INDEPENDENT SCIENCE BOARD

The charge of California Bay-Delta Authority's Independent Science Board (ISB) is to 1) understand the technical underpinnings of the CALFED Bay-Delta Program and provide insights on progress toward addressing those premises; 2) evaluate the balance and credibility of analyses and the use of science across all individual program areas and science agendas for building critical new knowledge; 3) approve performance measures developed within the program; and 4) identify impending issues and significant interconnections across programs.

Individuals nominated to the ISB are required to have national-level stature in their fields of research. Also by design, membership in the ISB includes individuals who conduct research directly related to the Bay-Delta system as well as individuals with experience in other systems and programs with no previous connection to the program. This balance between deep local knowledge and external perspectives is necessary for meeting CALFED's needs.

Several questions have arisen with respect to the application of California's open meetings and conflict of interest laws to the Independent Science Board. This policy is an attempt to address some of those questions.

Open Meetings Laws

California's Bagley-Keene Open Meetings Act applies to advisory bodies that are created by law. The California Bay-Delta Authority Act provides for the creation of the ISB. Thus meetings of the ISB must be noticed 10 days in advance and held in public in compliance with the requirements of the Bagley-Keene Act. The Act also applies to subcommittees of three or more members formed by the ISB or by its chairman, which are considered to be advisory committees to the ISB. Larger subcommittees may be formed for particular purposes, but they must meet the agenda and open session requirements of the Bagley-Keene Act. Small advisory subcommittees of two members are not subject to the open meeting requirements.

Conflict of Interest Laws

A. Political Reform Act

The California Political Reform Act prohibits public officials from making government decisions in which they have a financial interest. The disqualification provision of the Act hinges on the effect a decision will have on a public official's financial interests. When a decision is found to have the requisite effect, the official is disqualified from making, participating in the making, or using his or her official position to influence the making of that decision. (Gov. Code, section 87100.)

The Act also requires public officials to file statements of economic interests. (Gov. Code sections 87302, 87500.) Members of decision-making boards are subject to this requirement, but an advisory board is not, unless it has made substantive recommendations that have been, over an extended period of time, regularly approved without significant amendment by another government agency. Because the ISB is advisory in nature, does not make final government decisions or have the power to compel or prevent governmental decisions, and does not have a track record of having its recommendations adopted without change by the California Bay-Delta Authority, individuals serving on the ISB are not considered government officials for purposes of compliance with the California Political Reform Act, and are not required to file disclosures of financial interests (Form 700) as a result of their participation on the ISB. This may change in the future if the ISB does acquire a track record of having its recommendations adopted.

Certain members of the ISB do, however, carry out other activities for the CALFED Science Program, and may be considered "consultants" to the Authority or to the Association of Bay Area Governments as a result of those activities, and in that case, they will be required to file Form 700s.

B. Common Law Conflict of Interest Rules.

Even though members of the ISB are not formally covered by the Political Reform Act, they are still bound by common law conflict of interest rules. A clear expression of the common law doctrine is found in *Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.

If a situation arises where a common law conflict of interest exists as to a particular transaction, the official is disqualified from taking any part in the discussion and vote

regarding the particular matter. The common law doctrine applies to *non-financial* as well as financial personal interests.

C. California Government Code Section 1090

Although members of the ISB are not considered public officials for the purposes of the Political Reform Act, they are considered public officers or employees for purposes of compliance with California Government Code section 1090, which prohibits a public officer or employee from making a contract in which he or she is financially interested.

The prohibition applies to virtually all officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. It also includes the members of advisory bodies if they participate in the making of a contract in their advisory function. *Any participation by an officer or employee in their public capacity in the process by which such a contract is developed, negotiated, and executed, including planning and priority-setting through a PSP process or otherwise, is a violation of section 1090.*

For decision-making boards, if a member of the board has a financial interest, unless it is defined as a “remote” interest or non interest in Government Code sections 1091 or 1091.5, the entire board is precluded from acting on the contract. The Attorney General’s Office has not applied this restriction to bodies that are advisory only. If a member of the ISB has a financial interest in a proposed contract or grant, or a remote interest as defined in Government Code section 1091, the ISB may still make recommendations regarding that contract or grant, so long as the interested member discloses his or her interest, and disqualifies himself or herself from *any* involvement in or discussion of the contract.

If a member of ISB has a “non interest” as defined in Government Code section 1091.5, he or she may participate in the discussions leading to a recommendation regarding a future contract. For ISB members who are employed by public universities, section 1091.5 (a) (9) provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is “that of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed” and noted in the official records.¹ Thus, an ISB member may not participate in recommendations regarding a contract or grant that may be awarded to a member of his or her own department at a public university, but the member is not precluded from acting on other contracts to his or her home university. If the member’s university is a private institution, the member’s interest is not considered a non-interest, but would be a direct or remote interest that would require disqualification.

¹ The remote interests of Government Code section 1091 and non-interests of Government Code section 1091.5 are discussed in the Attorney General’s Conflict of Interest pamphlet, but the language of 1091.5 (a) (9), cited in this paragraph has been amended to read as quoted here.

Guidelines for ISB members

The following sets of guidelines apply these principles and others to specific activities members of the ISB are likely to engage in as part of their ISB service.

Representing ISB

The ISB as a body deliberates and provides advice to the Authority and the Bay-Delta Public Advisory Committee, as well as to the Science Program and the Lead Scientist, on the science relative to implementation to all Program elements. ISB members should avoid situations where they speak for the Board unless specifically delegated to do so by the Board.

Open Meetings

ISB meetings and deliberations will be held as a public meeting and public notice for these meetings will be distributed 10 days in advance. Once the agenda has been distributed, matters may not be added to the agenda (with certain exceptions specified in the Bagley-Keene Act), and the ISB may not make recommendations on items not listed on the agenda.

The ISB may form subcommittees of 1 or 2 people to work on an issue to prepare it for deliberation by the broader ISB at a public meeting, and meetings of these small subcommittees are not required to be public. Subcommittees of 3 or more, formed by the ISB or its chair, will be considered advisory committees and will be subject to the open meetings requirements.

The Open Meeting Act contains a specific prohibition against so-called “serial meetings”-that is, a series of communications employed to develop concurrence as to actions to be taken by the ISB, each of which involves less than a quorum, but which taken as a whole involves a majority of the ISB members. Conversations that advance or clarify a member’s understanding of an issue, or facilitate an agreement or compromise communications that contributes to the development of a concurrence of action to be taken. Serial meeting issues arise most commonly in connection with **rotating staff briefings, telephone calls or e-mail communications** among a quorum of board members.

For example, the Attorney General’s Office has previously opined that a majority of board members may not e-mail each other to discuss current topics related to the board’s jurisdiction even if the e-mails are also sent to the secretary and chairperson of the agency. The e-mails are posted on the agency’s Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.

In a related context, the AG’s Office has advised that staff may receive spontaneous input from board members on the agenda or on any other topic, but cautions that problems arise if there are systematic communications involving a quorum of the body acquiring information or engaging in debate, discussion, lobbying or any other aspect of the deliberative process, either among themselves or between board members and staff. If

staff receives the same question on substantive matters to be addressed in an upcoming agenda from a quorum of the body, the AG's Office recommends that a memorandum be prepared by staff addressing these issues so that members of the body and the public will receive the same information.

CBDA staff will maintain the public record and members of the public may view the record and make copies of specific documents. Meeting agendas, meeting summaries and background reading materials provided as a packet prior to the ISB meeting will be posted on the Science Program website. In addition, e-mail correspondence from staff or other individuals to the entire ISB will be considered a public document and may be posted on the CBDA website and/or distributed to the public during the next ISB meeting.

Conflicts of Interest

Disclosure: Although membership on the ISB does not, by itself, trigger the need to file financial disclosure statements under the California Political Reform Act, the Science Program has determined as a matter of policy that disclosure of an individual member's activities is an important element of managing the public perception of bias.

It is the responsibility of Board members to disclose any professional activities they are engaged in, including service as an expert witness or advisor, that may be perceived as being related to the CALFED Program and it is the desire of the ISB to construe this responsibility broadly (i.e. included funded and unfunded work, and disclosure when there is uncertainty about the relevance of work to CALFED). Disclosures should be timely, for example before discussing a specific agenda item at a meeting.

It is also important for individuals being asked to serve as peer reviewers for specific proposals and products to disclose any professional and financial connections to the authors or work being reviewed prior to CALFED staff prior to performing any peer review work.

Fact-Finding

ISB members may be requested or assigned by the Board, as part of a subcommittee or otherwise, to engage in various CALFED activities or conduct limited research or investigations as part of the process of learning more about the management context and specific technical issues. However, such assignments will not be used as a means of circumventing the conditions under which ISB members may engage directly in original work through directed action processes. Members' contracts will contain a limit on the amount which can be expended for these purposes.

Providing Expert Opinions and Analysis

One of the goals of the CALFED Science Program is to bring scientific expertise into all areas of the program by engaging experts in standard practices of the research community including peer review, information synthesis, and the development of new knowledge

through inquiry and investigations. Most of the individuals serving on the ISB have worked in one or more of these capacities for the Program on topics ranging from the Environmental Water Account and wetlands monitoring program reviews; to demonstrations of approaches for applying sophisticated modeling techniques to Delta smelt population questions.

Individual experts, including members of the ISB, may accept invitations from the Lead Scientist, Science Program staff, and other CALFED Programs to serve in these capacities (paid or unpaid), so long as public contracts requirements are met, and so long as they have not in any way participated in a public capacity in recommending that the particular work be done.

Participation in Workshops

Individuals who serve on the ISB may participate in public workshops, and report on their past or ongoing work. ISB members shall take care, however, not to participate in their public capacity in making recommendations for future work for which they themselves would seek funding, or in which they would have a financial interest.

Review Panels

Individuals who serve on the ISB may also agree to serve on other review panels and Boards in CALFED. These activities fall under those that should be disclosed to the public in a timely manner and individuals serving on the review panels must not have a financial interest in any of the projects being reviewed.

Avoidance of Conflicts. In order to minimize or avoid conflicts of interest, the ISB as a body will not be asked to provide advice to the Authority, BDPAC or the Science Program on specific elements within any request for proposals. The ISB may, however, advise on peer review processes in general.

Peer Reviews

Individuals who serve on the ISB and other standing CALFED Science Boards may agree to conduct a peer review of an individual proposal, subject to the standard condition that reviewers should not have any financial or professional interest in the proposal. As with disclosure guidelines, individuals should construe financial and professional interests broadly. A potential reviewer should not review a proposal in which he would have a direct interest, or a remote interest as defined in Government Code section 1091. An example of a clear conflict of interest is when an individual has assisted in the development of a proposal, or will receive financial benefit from the funded project, it would be a clear violation to agree to conduct a peer review for CALFED of that proposal. If the individual's interest would be considered a non interest under Government Code section 1091.5, the individual could review the proposal. Because proposals by others in the same department are not considered non-interests, scientists in public universities should not review proposals by their own graduate students or others in their department, but are not precluded from reviewing proposals from parts of the university other than their own employing unit or department. As a matter of policy, an

ISB member may want to preclude reviewing any proposals from a reviewer's home university.

Calls for Proposals (PSPs, RFPs, IFBs, etc.)

Individuals who serve on the ISB may serve as reviewers and advisors to the Science Program and other CALFED Programs on specific calls for proposals and as members of panels in the proposal selection process. These activities include reviewing implementation and Proposal Solicitation Process (PSP) documents, reviewing multiple proposals, and participating as members of technical synthesis and selection panels. While the ISB as a body will not be asked to participate in these activities, individual board members who have elected to do so must disclose these activities in ISB deliberations.

The Science and Ecosystem Restoration Program's selection processes are comprised of 5 main steps. The first is preparing documents describing programmatic scientific priorities. The second is a mail review by at least three experts of each proposal received. The third is a technical synthesis panel whose charge is to prepare an integrated and balanced technical evaluation of all proposals received based on the individual mail reviews. The fourth step is a selection panel whose charge is to select and prioritize the high quality technical proposals based on program need, and to recommend the full package to the Authority for approval.

Individual board members who elect to participate as advisers or reviewers in any specific calls for proposals are prohibited from submitting a proposal to the same process. Individuals may submit proposals to CALFED PSPs they have not participated in—for example, an individual who advises the Science Program on its PSP may apply for funding through the Ecosystem Restoration PSP so long as they have not participated in the Ecosystem Restoration PSP process in any specific manner. Individuals who have advised a CALFED program in general terms on peer review and RFP processes, for example by communicating the sequence and rationale used by the National Science Foundation, are not presumed to have participated in a specific PSP.

The general rule for avoiding conflict in the review of individual proposals in this process is that individuals should not review proposals in which they have a direct or remote financial interest and should disclose associations.

Directed Actions

Individual researchers who are members of the ISB may also engage directly in original work for CALFED through directed action processes if all of the following conditions are met:

Condition (1): The Science Program (or other CALFED Program) explicitly defines the need for the specific study topic, without input from individuals who will seek to do the work. Any ISB member who may wish to apply for funds must fully disqualify himself

from any discussion of the possible studies at an ISB meeting and must not attempt to influence staff...

Condition (2): An open solicitation process has been used by the Program. The Science Program or other CALFED program has conducted an open solicitation for the critical study need. The solicitation can be anything from a broad PSP as described above, a limited request for specific proposals, or a request for qualifications such as might be used in identifying team members for a multidisciplinary study. The goal of this open process is to ensure fairness.

Condition (3): The funding agency is satisfied that qualified individuals who are not Board and panel members have had an opportunity to apply to conduct the study.